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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 35225

SAN BENITO RAILROAD LLC
-ACQUISITION EXEMPTION--
CERTAIN ASSETS OF UNION PACIFIC RAILROAD COMPANY

OPPOSITION TO MOTION TO DISMISS NOTICE OF EXEMPTION

INTRODUCTION AND SUMMARY OF POSITION

The Brotherhood of Maintenance of Way Employees Division/IBT ("BMWED"), and Brotherhood of Railroad Signalmen ("BRS") (referred to jointly as "Unions"), the unions that respectively represent railroad maintenance of way and signal workers nationally, and on all of the Class I carriers, including Union Pacific Railroad ("UP") oppose the motion filed by San Benito Railroad LLC ("San Benito") for dismissal of San Benito's notice of exemption for its acquisition of a segment of UP's line in San Benito, California. This transaction involves San Benito's acquisition of an active rail line that is part of the interstate rail system that will still be used by UP for interstate train movements. Accordingly, this transaction is within the jurisdiction of the Board and must be approved or exempted from approval by the Board.¹

San Benito argues that the Board should dismiss the notice of exemption because UP will have a so-called "operating easement" for freight transportation. By this arrangement, San Benito will own and control the acquired line segment, and UP will be responsible for providing service to the freight shippers on the line. San Benito asserts that although it will be acquiring a rail line

¹ BMWED sought, and was granted, an extension of time to file a response to the motion to dismiss; this opposition is filed prior to the date allowed for its filing. BRS intervened in this proceeding after the due date for filing a response but stated it would file jointly with BMWED. In the event that BRS needs to seek leave to file a response at this time, BRS respectfully requests such leave.

that is part of the interstate system, a transaction that is otherwise within the STB's jurisdiction and subject to its approval, the device of a conveyance of the line subject to an operating easement for UP with UP having service rights and obligations with respect to shippers on the line negates the clear requirements of the ICCTA. In making this argument, San Benito, a private entity, has relied on the decision in *State of Maine-Acq. and Op. Exemption*, 8 ICC 2d 835 (1991), and subsequent decisions which followed *State of Maine*. In those cases, states and local governments acquired rail lines from rail carriers in order to provide commuter rail service, while the selling carriers were responsible for freight movements on the lines.

BRS and BMWED contend that San Benito's motion should be denied because it is contrary to the ICCTA. The acquisition of a line of railroad that is part of the interstate rail network and used in interstate rail transportation is a transaction subject to STB jurisdiction. The notion that a person (State or other) can acquire a line that is part of the interstate system and used in interstate commerce without STB approval or exemption is fundamentally at odds with the Act. The device of an "operating easement" for freight traffic only has no basis of support in the Act. The Act gives the STB broad and exclusive jurisdiction over transactions involving rail lines used in interstate commerce; and it also comprehensively lists numerous types of transactions involving rail lines. "Operating easement" is not a concept or arrangement identified in, or described in the Act, a statute which covers all sorts of conveyances, operating arrangements and shared use arrangements involving rail lines.

To the extent that San Benito has relied on the *State of Maine* line of cases, BMWED and BRS respectfully submit that those cases were wrongly decided and should not be followed here. The Board should not permit evasion of the unambiguous statutory mandate for Board approval or exemption of acquisitions of segments of the interstate rail system via a concocted device that

has no basis in the Act.

The Unions recognize that with *State of Maine*, the ICC and then the Board began to allow conveyances of small, lightly trafficked lines to be sold to states without agency approval or exemption; and that this practice has escalated so that the Board has allowed ever larger sales and sales of very active lines through this extra-statutory device. But BRS and BMWED note that virtually all of those decisions were ex parte, with no challenge to the basic principal involved; and that there has been essentially no briefing as to whether the agency can allow creation of an operating easement transaction to defeat Congress' jurisdictional mandate. The *State of Maine* approach has developed and been uncritically accepted and applied through a proliferation of largely pro forma decisions that have allowed this fabricated exception to defeat clear statutory directives. And none of these cases has been appealed; so the doctrine relied on by San Benito has not been sanctioned by any court of appeals. Indeed this line of cases conflicts with appellate precedent. *E.g. Staten Island Rapid Transit Operating Authority v. I.C.C.*, 718 F.2d 533 (2nd Cir. 1983). Additionally, the Unions will show that regardless of the original validity or invalidity of the *State of Maine* rule, the basis for that rule was nullified by new provisions of the ICCTA, and decisions interpreting those provisions.

Recently, the State of New Mexico acquired 300 miles of active interstate rail lines through this device; presently, the State of Florida is seeking to evade STB jurisdiction and the requirements of the ICCTA in acquiring a very active piece of a CSXT main line that would continue to have both overhead and local freight movements as well as multiple daily Amtrak trains. In another case, *State of Maine* was cited as supporting rejection of STB jurisdiction over a private interstate passenger service. And now, a private business seeks to use the *State of Maine* approach in acquiring a part of an active interstate line. The Unions respectfully submit that

whatever the motivation was for the *State of Maine* decisions, the rule was in error and has been abused. It is now time for the Board to restore the law in this area so that it comports with the ICCTA. The Board should hold that a line of railroad that is part of the interstate rail network that is used for interstate rail transportation is a transaction subject to STB jurisdiction, and that such a line may not be sold without Board approval or exemption from approval. San Benito's motion for dismissal should therefore be denied.

FACTS

According to San Benito, it plans to acquire about 12 miles of UP's line in San Benito, California, extending south from Gilroy. San Benito plans to contract with a third party operator to provide passenger service on the line from its southern end (apparently Hollister) to Gilroy. UP would continue to serve the shippers on the line, and would have the exclusive right and common carrier duty to provide freight service on the line. Motion at 1-2. UP would therefore be the sole freight service provider on the line and San Benito would be the owner of the line, and (through its operator) would be the sole passenger service provider on the line.

The rights and duties of the parties as passenger and freight service providers respectively are set forth in the agreement between the parties (Motion Ex. B). The trackage to be conveyed is part of the UP system that connects with the UP main line at Carnadero. Motion at 2. Among other things, the management and operation of the trackage will be under the exclusive direction and control of San Benito and San Benito will control dispatching on the line. *Id* at 13.

According to the agreement, San Benito will be responsible for maintaining the right of way, track, structures and signal system (though each party may make modifications appropriate and necessary for its own service). *Id* at 8-9, 17.

The line to be conveyed currently serves two shippers: San Benito Foods and Tri Cal

Chemicals. Trains serving those shippers move onto the UP double track main line via a connection at Carnadero. Cal Train runs passenger trains from Gilroy to San Francisco. Cal Train services San Jose station which is also serviced by Amtrak. A person on a passenger train on the line at issue could travel from its southern end to Gilroy, and then access a Cal Train train to San Jose and then get on the Amtrak Coast Starlight trains that run between Seattle and Los Angeles. Declaration of Louis Below ¶5; Declaration of Joseph Harry Doucet ¶5; Attachments 1 and 2 to this brief.

BMWED represents UP maintenance of way employees who historically and currently inspect, maintain, repair and renew the right of way, track and structures for the line at issue, pursuant to the BMWED-UP collective bargaining agreement. BRS represents UP signalmen who historically and currently inspect, maintain, repair and renew the signal system for the line at issue pursuant to the BRS-UP collective bargaining agreement. If San Benito acquires the line at issue, UP employees will no longer be responsible for, or have the right to perform, the inspection, maintenance, repair and renewal work on the right of way, track, structures and signal system for the line at issue. Below Declaration ¶6 Doucet Declaration ¶6.

STB JURISDICTION OVER LINE SALES AND RAIL CARRIERS, AND RAIL CARRIER STATUS

The Board has jurisdiction over transportation by rail carrier over a line of railroad between a State and a place in the same state as part of the interstate rail network. 49 U.S.C. §10501(a)(1) and (2).² Additionally, the Board's jurisdiction over "transportation by rail carriers"

² ICCTA Section 10501 (a) provides:

(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is -(A) only by railroad...

(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in -(A) a State and a place in the same or another State as part of the interstate rail network...

, “is exclusive”. Section 10105(b). The Act defines “rail carrier” as an entity that provides “common carrier railroad transportation for compensation”, but not “street, suburban, or interurban electric railway not operated as part of the general system of rail transportation”. Section 10102(5). “Railroad” includes a road used by a rail carrier as well as track, bridges, switches, spurs, terminals, and yards used or necessary for transportation; and “transportation” includes locomotives, cars and equipment “related to movement of passengers or property or both by rail”, as well as services related to that movement. Section 10102(6) and (9).³ Furthermore, under Section 10901 and precedent under that provision, a person may construct or extend a rail line, provide transportation by rail or acquire a railroad only pursuant to Board authorization.⁴ The Act exempts local government authorities and their transportation services providers from Board jurisdiction in connection with mass transportation, but such entities are

³ Section 10102 provide:s

(6)“railroad “ includes - (A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad; (B)the road used by a rail carrier and owned by it or operated under an agreement; and (C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation.

(9)“transportation includes-(A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property

⁴ Section 10901 provides:

(a) A person may -(1)construct an extension to any of its railroad lines; (2) construct and additional railroad line; (3)provide transportation over, or by means of, an extended or additional railroad line; or (4) in the case of a person other than a rail carrier, acquire a railroad line or acquire or operate an extended or additional railroad line, only if the Board issues a certificate authorizing such activity under subsection (c).

still covered by statutes concerning rail safety (Federal Railroad Safety Act), representation (Railway Labor Act) and employment benefits (e.g. Railroad Retirement Act). Section 10501 (c) .

Decisions interpreting these provisions, and discussing the jurisdiction of the STB generally, have construed the definitions broadly and applied the STB's jurisdiction expansively. *E.g. CSX Transp. v. Georgia Public Service Comm.*, 944 F. Supp. 1573 (N.D. Ga 1996), noting that the STB has exclusive jurisdiction over transportation by rail carriers and the acquisition of tracks even "wholly intrastate railroad tracks" (*id.* at 1584), that "transportation", "is defined very expansively in the Act" (*id.* at 1582)..., and that railroad agencies within States are covered by the definition of transportation by rail carriers as well as by the definition of services of railroads over which the STB has exclusive jurisdiction (*id.* at 1581-1582). Accordingly, State regulation of railroad agencies within Georgia was preempted. In this regard, the Court noted that the ICCTA removed from the States jurisdiction over wholly intrastate railroad tracks giving the STB "complete jurisdiction, to the exclusion of the states over the regulation of railroad operations". *Id.* at 1584. *See also Burlington Northern Santa Fe Corp. v. Anderson*, 959 F. Supp 1288 (D. MT 1997)— in the ICCTA, "Congress granted the newly established Surface Transportation Board jurisdiction over railroad transportation in both interstate and intrastate commerce 49 U.S.C. §10501" (*id.* at 1294), the grant of jurisdiction over "transportation by rail carriers" covers railroad agencies such that state regulation as to agencies is preempted (*id.*); *Norfolk Southern Ry. v. City of Austell, Georgia*, 1997 WL 1113647 (N.D. Ga. 1997) —ICCTA grants the STB "exclusive jurisdiction over the majority of all matters of rail regulation" ; and the ICCTA defines "transportation", "very broadly", and defines "railroads in an expansive fashion" (*id.* *6), so local zoning laws are preempted with respect to a rail carrier's plan to construct an intermodal

facility; and *Franks Investment Co. v. Union Pacific R.R.* 534 F. 3d 443, 445-446 (5th Cir. 2008), holding that railroad crossings fit within the purview of “transportation by rail carriers” so a state law action to stop a railroad’s removal of crossings was preempted by the ICCTA.

Thus, under the Act, the Board has authority over, and exclusive jurisdiction over, acquisition and operation of rail lines that are part of the interstate rail network; even if the lines involved are only in one state and the operations are only intrastate. Consequently, rail lines, both interstate and intrastate that are part of the interstate rail network, may be acquired only pursuant to STB approval or exemption from approval; and operation of those lines is subject STB jurisdiction.

Various decisions dealing with challenges to ICC/STB jurisdiction and carrier status have construed that jurisdiction broadly and have held that entities that asserted they were not carriers were in fact rail carriers. In particular, Courts and the ICC/STB have held that acquisition and operation of intrastate lines that are part of the interstate system are subject to STB jurisdiction; and that owners and operators of such lines are rail carriers. Additionally, owners and operators of intrastate, and interstate passenger-only operations are rail carriers subject to the STB’s jurisdiction.

In *Staten Island Rapid Transit Operating Authority v. I.C.C.*, 718 F.2d 533 (2nd Cir. 1983), the Second Circuit held that the ICC had properly concluded that the Staten Island Rapid Transit Operating Authority (“SIRTOA”), a division of the New York Metropolitan Transportation Authority that operated a 14.5 mile strip of electric railroad line wholly within Staten Island, New York was a rail carrier. SIRTOA was a carrier because the line was part of the interstate system and was still used in interstate commerce for freight movements by a freight railroad; even though SIRTOA’s “primary function” was to operate a local (intrastate) passenger

service. SIRTOA had maintenance responsibilities for the line and had an express obligation to maintain the line for interstate freight transport; SIRTOA also had a “latent duty under the current certification of public convenience and necessity to furnish that freight service which is provided by SIRT [prior owner of the line] under the Trackage Rights Agreement”; and SIRTOA’s dispatchers controlled the flow of interstate traffic on the line. *Id.* at 539-540. SIRTOA did not fall within the electric railway exception--which applies only to lines not otherwise used directly or indirectly in the movement of freight and passengers associated with the general system of transport, because the line connected with the general system and was used to effect service over that system. *Id.* The court found unpersuasive SIRTOA’s attempt to distinguish between the physical railway line and the railway itself (*id.* at 541), noting that the line is used regularly for interstate commerce. *Id.* at 542. Subsequently, after the ICC authorized SIRTOA’s abandonment of its obligation to allow freight carriage on its line, the ICC then determined that SIRTOA was no longer a “carrier”. In *Railway Labor Executives’ Association v. Interstate Commerce Commission*, 859 F.2d 996 (D.C. Cir. 1988), the D.C. Circuit affirmed that decision because the interstate operations on the line had stopped and the duty to provide such service had been extinguished.

In *American Orient Express Railway Company* STB Finance Docket No. 34502 (Dec. 27, 2005), the Board held that American Orient was a rail carrier under Section 10501(a)(1) even though it did not own the tracks on which it operated, or provide its own motive power. Although American Orient argued that “the transportation” was provided by Amtrak, the Board noted that American Orient provided the rail cars and services to passengers that were related to the passenger movements, so it provided transportation. In response to American Orient’s argument that it did not engage in railroad transportation because it did not own the equipment, road, or

facilities listed in the statutory definition of “railroad”, the Board concluded that American Orient was a railroad because “railroad” embraces roads operated under an agreement such as that between American Orient and Amtrak. Next, the Board asked whether American Orient was a common carrier. The Board noted that there is no statutory definition for “common carrier”, but that the Board applies the following common law concept: An entity that holds itself out to the general public as engaged in the business of transporting persons or property from place to place for compensation is a common carrier. American Orient argued that it did not cater to the general public, as it did not transport children under eight, or persons with disabilities incompatible with rail travel. But the Board found that this did not preclude a finding that American Orient was a common carrier, as a common carrier may establish a business niche.

The Court of Appeals for the D.C. Circuit affirmed the Board’s decision. *American Orient Express Railway Co. v. Surface Transportation Board*, 484 F.3d 554 (D.C. Cir. 2007). The Court rejected American Orient’s assertion that it was not a railroad because it did not own tracks, noting that a rail carrier may use tracks owned by another entity and operate under an agreement. *Id.* at 556. The Court also rejected American Orient’s assertion that it was not a common carrier because it did not provide a service meeting a specific and provable public need. *Id.* at 557. The court emphasized that to be a common carrier, “a company need only, in practice, serve the public indiscriminately and not ‘make individualized decisions, in particular cases, whether and on what terms to deal’”; “[o]ne may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population.” *Id.* (citing *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976).

In DesertXpress Enterprises, LLC–Petition for Declaratory Order, F.D. No. 34914 (June

27, 2007) (2007 WL 1833521 (S.T.B.) the Board concluded that an entity that would build a rail line that crossed state lines, but would only provide passenger service, would be rail carrier and subject to the Board's jurisdiction. The Board noted that its jurisdiction over "transportation by rail carriers' over any track that is part of the interstate rail network 'is exclusive'", and that the Board has jurisdiction over persons "providing common carrier railroad transportation for compensation". Since DesertXpress would carry passengers by rail in interstate transportation as a common carrier, it would be rail carrier, subject to the Board's exclusive jurisdiction. *Id.* at *3.

**THE UP-SAN BENITO TRANSACTION MUST BE APPROVED
OR EXEMPTED FROM APPROVAL BY THE BOARD**

BMWED and BRS submit that under the language of the Act, and the precedent discussed above, the UP-San Benito transaction is subject to the Board's jurisdiction and must be approved by the Board or exempted from such approval. San Benito will be acquiring a line of railroad that is within a state but is part of the interstate rail network; San Benito will be providing railroad transportation for compensation on a line that is part of the interstate rail system; the line will still be used for interstate railroad transportation; and not only will San Benito own the line, it will be responsible for maintenance of the line and its signal system, and for dispatching. This transaction is clearly subject to the Board's jurisdiction and may be effected only pursuant to Board approval or exemption from approval under Section 10901.

San Benito acknowledges that it would seem to require STB approval or exemption of its acquisition of the UP rail line (Motion at 3), but San Benito contends that such approval or exemption is not necessary under a line of decisions regarding line acquisitions by State agencies where freight railroads would continue to hold exclusive operating easements for freight service (*State of Maine-Acq. and Op. Exemption*, 3 ICC 2d 835 (1991) and cases which rely on that

decision). Motion at 4 - 7. However, the *State of Maine* cases are not only factually distinguishable from this case, they should not be followed here because they were wrongly decided; they are contrary to the language of the Act concerning the nature of rail carriers and the need for STB authorization of acquisitions of rail lines in interstate commerce; and they are contrary to provisions of the ICCTA concerning STB jurisdiction over intrastate rail lines.

State of Maine involved the State's acquisition 15 miles of line within Maine where the selling carrier would continue to provide freight service on the line and would retain a so-called "operating easement" for all freight service, the State would not actually provide service on that line, and the selling carrier would remain responsible maintaining the line and its signal system. The State filed a notice of exemption and then a motion for a determination that the ICC lacked jurisdiction over the transaction. No other party participated in that case and the Commission concluded that it lacked jurisdiction "based on the facts of this particular transaction". The Commission also noted its "long-held policy 'to remove obstacles which might inhibit States from acquiring lines so that service might be continued'" (fn. 7). The ICC said that it had exclusive jurisdiction over acquisition of a rail line by a non-carrier, but concluded that the operating easement device negated that jurisdiction because the freight railroad would retain the common carrier obligation and could not cease operations without Commission approval. In so holding, the ICC did not identify in the Act, or in precedent, any basis for an "operating easement", or for the notion that such a device could be utilized to eliminate the necessity for ICC approval or exemption of an acquisition of a rail line that is part of the interstate rail system. The Commission seems to have just concluded that this would be permissible; although it warned that the determination was specific to that case and might not apply to similar transactions.

Following the *State of Maine* decision, there were a series of other cases where the exception was adopted and expanded without explanation, generally in ex parte proceedings in decisions with typically one page of discussion. *E.g. Utah Transit Authority*, 1993 WL 112128 (I.C.C.)- Utah Transit Authority acquired 24 miles of UP line to use for commuter rail operation with UP continuing to serve shippers on the line under exclusive operating easement, though freight service was limited to five hours per day during the night; *New Jersey Transit – Acquisition Exemption – Certain Assets of Conrail*, 4 S.T.B. 512 (2000)-- State of New Jersey acquired 32 mile rail line and trackage rights for New Jersey Transit passenger service with selling carrier continuing to provide freight service, but restricted to specified times; *State of Wisconsin Department of Transportation-Petition for Declaratory Order*, STB Finance Docket No. 34181, (July 30, 2002)(2002 WL 176404(STB))- Wisconsin DOT acquired approximately 14 miles of line for possible commuter rail service, with the selling carrier to continue providing freight service; *New Mexico Department of Transportation*, STB Finance Docket 34793 (February 3, 2006)(2006WL 308726 (STB))-New Mexico acquired 297 miles of rail line from BNSF for commuter rail service with BNSF retaining an exclusive freight operating easement, though restricted to certain times; Amtrak service over the line continued as before. As this line of cases progressed, the elements of the selling carrier continuing to maintain and renew the line, and the stated purpose of preserving endangered rail service seem to have fallen by the wayside. Now there tends to be virtually automatic dismissal of notices of exemption based on unopposed motions to dismiss that assert that part of the deal involves an operating easement for the selling carrier where it will be responsible for all freight shipping on the line, and there are certain restrictions on freight movements (like time of day). And all of these decisions merely repeat the reasoning of the *State of Maine* decision without attempting to reconcile that reasoning with the

language of the Act.

Of course the instant case differs from all of the decisions on which San Benito relies in that the acquiring entities in all of those cases were States, or State agencies; whereas San Benito is a private entity that will own a line that will still be used for interstate railroad transportation. Accordingly, the *State of Maine* line of cases is inapposite to this case. But, more importantly, BRS and BMWED respectfully submit that the *State of Maine* line of cases were wrongly decided, and should not be applied here. Simply put, the acquisition of a line of railroad that is part of the interstate rail system is a transaction subject to STB jurisdiction; and such a transaction cannot occur without Board approval, or exemption from Board approval. The notion of a conveyance of a line that is part of the interstate rail system without STB authorization, without the acquiring entity having a common carrier obligation and without rail carrier status, has no basis in the Act. The concept that a selling carrier's "retention" of an "operating easement" for freight obviates the need for STB approval or exemption is simply without support in the language of the Act or prior precedent under the Act; indeed it is contrary to the SIRTOA cases. It is also contrary to new provisions of the ICCTA.

As the Unions have shown, under the plain language of the Act, the Board has general jurisdiction over transportation by rail carrier over a line of railroad between a State and a place in the same state as part of the interstate rail network. A "rail carrier" is an entity that provides "common carrier railroad transportation for compensation" (but not "street, suburban, or interurban electric railways not operated as part of the general system of rail transportation"); "Railroad" includes a road used by a rail carrier as well as track, bridges, switches, spurs, terminals, and yards used or necessary for transportation; and "transportation" includes locomotives, cars and equipment "related to movement of passengers or property or both by rail".

The Board's jurisdiction over "transportation by rail carriers" , "is exclusive". Furthermore, under Section 10901 and precedent under that provision, a person may construct or extend a rail line, provide transportation by rail or acquire a railroad only pursuant to Board authorization. Thus, the assertion that the Board lacks jurisdiction over the sale of a rail line that is part of the interstate rail network and is used for interstate rail transportation is contrary to the clear language of the Act.

Beyond the plain meaning of the provisions of the Act, decisions interpreting those provisions, and discussing the jurisdiction of the STB, generally have construed the definitions broadly and applied the STB's jurisdiction expansively. Courts have held that the ICCTA defines "transportation", "very broadly", and defines "railroads in an expansive fashion" (*Norfolk Southern Ry. v. City of Austell, Georgia*, 1997 WL 1113647 *6); that the Board has exclusive jurisdiction over transportation by rail carriers and the acquisition of tracks even "wholly intrastate railroad tracks"; and that "transportation" and "transportation by rail carriers" are defined so expansively that railroad agencies and railroad crossings within states are covered by those terms . *CSX Transp. v. Georgia Public Service Comm.*, 944 F. Supp. 1581-4; *Franks Investment Co. v. Union Pacific* 534 F. 3d 443 at 445-446.

Thus, the ICCTA unambiguously provides that the Board has jurisdiction over an entity that provides common carrier transportation over a line of railroad that is within a state, but is part of the interstate rail network; and that a person must obtain STB approval or exemption of a plan to construct or a acquire a line of railroad that is part of the interstate system. Consequently, acquisitions of segments of rail lines that are part of the interstate rail network that will continue to be used for interstate transportation are necessarily subject to STB jurisdiction and approval or exemption-they may be exempted from approval, but they are within the Board's jurisdiction.

By contrast, there is no statutory support for the reasoning in the *State of Maine* line of cases. The Act provides for exemptions from STB approval and excepts certain entities and activities from regulation, but it does not provide that a party can acquire a line of railroad that is part of the interstate rail network and used for interstate transportation by agreeing with a rail carrier selling a line that the rail carrier will continue to serve the shippers on the line. Nor is there any statutory basis for differentiating between acquisition of the line, and acquisition of the land that is the right of way and the rails, ties and ballast that together constitute the line. A line acquisition does not cease to be a line acquisition because parties to an agreement call it a sale of real property and appurtenances thereto, or a conveyance “of the underlying physical assets” coupled with retention of an exclusive operating easement for freight. San Benito Motion at 2. Indeed, these terms do not even exist in the Act.

The Act comprehensively lists numerous types of transactions involving conveyance and use of rail lines (*e.g.* construction, acquisition, extension, consolidation, lease, acquisition of control, trackage rights, contract to operate, joint use, pooling), and makes clear that all of them are subject to the STB’s jurisdiction. The Act also comprehensively identifies all sorts of track, track segments, equipment, structures, facilities and buildings used by railroads in interstate transportation as parts of rail carriers subject to STB jurisdiction. The Act does not refer to “operating easements”. Nor does the Act refer to sales of dirt, wood, ballast and steel as different from the trackage they make up that actually is the rail line. These are not actual transactions or railroad components that exist outside the comprehensive and exclusive jurisdiction of the STB. The re-characterization of transactions by use of new names is not a basis for taking them outside the Act. Indeed, the notion that there is a newly discovered exception from STB jurisdiction for sale of rail lines coupled with freight operating easements is not only without support in the Act,

and contrary to its plain terms, it is contrary to the history of the Act and its predecessors. The statutory scheme evolved as necessary to cover a changing set of transactions and various schemes to evade ICC/STB jurisdiction; and the consistent intent of Congress has been that the agency have exclusive jurisdiction over railroad transactions involving the interstate rail system (albeit with less regulation and exemptions from regulation). The construct developed and modified in the *State of Maine* line of cases should therefore be rejected as contrary to the Act.

The *State of Maine* line of cases is also contrary to other precedent. In fact, its is in direct conflict with the SIRTOA decisions. As the Unions have shown, the Second Circuit expressly held that an entity that only owns a rail line within a state, and only provides service within the state is still a rail carrier if its line connects with the interstate system and is used for interstate transportation. The Court affirmed the ICC's decision that SIRTOA was a carrier, noting that, as owner of the line, SIRTOA had an express obligation to maintain the line for interstate freight transport and a latent duty to furnish freight service, that SIRTOA's dispatchers controlled movement of interstate traffic on the line, and that the line connected with the general system and was used to effect service over that system. 718 F. 2d 539-540. Moreover, the court specifically rejected SIRTOA's argument that the physical line of railroad that was connected to the interstate system should be distinguished from SIRTOA's own operations that were purely intrastate, holding that the ICC's focus on the physical railway line was proper, and noting that "as a practical matter, the line and the railway are integrally related". *Id.* at 541-542. Subsequently, in *RLEA v. ICC*, it was held that SIRTOA was no longer a rail carrier and subject to the ICC's jurisdiction because the agency had authorized both the freight railroad and SIRTOA to end provision of interstate service on the line. 859 F. 2d at 998.

BRS and BMWED submit that these decisions demonstrate the error in the *State of*

Maine line of cases, and that the motion in this case should be rejected. Indeed, when the facts of this case are overlaid on the facts of the SIRTOA cases, it is readily apparent that the motion to dismiss should be denied. Like SIRTOA, San Benito's own operations will be purely intrastate, but it will own a line of railroad that is connected to the interstate rail network, and is used for interstate rail transportation; San Benito will be responsible for maintaining the line and signal system used for interstate train movements and will control dispatching of interstate trains; and there has been no authorization of cessation of interstate transportation. The Board should reach the same result as was reached in the original SIRTOA case.

BMWED and BRS further submit that the *State of Maine* line of cases are at odds with the recent decisions in *American Orient* and *DesrtXpress*. In *American Orient*, an operator that did not own track or its own motive power was deemed a rail carrier and subject to STB jurisdiction. And in *DesertXpress*, an entity that was building a new line that might or might not connect with the interstate system, but would operate across state lines was deemed a rail carrier and subject to STB jurisdiction. If those two entities are carriers subject to STB jurisdiction, then an entity that actually owns a rail line that connects with the interstate rail network and is actually used for interstate rail transportation must be a rail carrier subject to STB jurisdiction.

Finally, even if the original *State of Maine* decision was valid when issued, it ceased to be valid after passage of the ICCTA. As the Unions have shown, the ICCTA gave the STB exclusive jurisdiction over transportation by rail carriers including transportation between a place in a State and a place in the same State as part of the interstate rail network; and the ICCTA gave the Board jurisdiction over acquisition of "wholly intrastate railroad tracks". Since *State of Maine* was decided, it has been held that the grant of jurisdiction to the STB over railroad transportation in both interstate and intrastate commerce meant that state regulation of railroad

agencies was preempted (*CSX Transp. v. Georgia Public Service Comm.*, 944 F. Supp. 1581-1584; *Burlington Northern Santa Fe Corp. v. Anderson*, 959 F. Supp at 1294); local zoning laws were preempted (with respect to rail carrier's plan to construct intermodal facility) (*Norfolk Southern Ry. v. City of Austell, Georgia*, 1997 WL 1113647 *6); and a state law action to stop railroad's removal of crossings was preempted. *Franks Investment Co. v. Union Pacific R.R.* 534 F. 3d at 445-446.

Beyond the specific holdings in those decisions, the courts in those cases also noted that the ICCTA represented a change from the ICA with respect to federal authority over intrastate rail matters. The courts found that Congress had increased the Board's jurisdiction regarding intrastate matters that affect the interstate rail system, and made that jurisdiction exclusive. Thus, the Court in *CSXT v. Georgia Public Service Comm.* noted that the ICCTA repealed ICA provisions regarding state certification of intrastate rates and practices, and deleted as unnecessary a policy statement about regulatory cooperation between the federal and state governments. 944 F. Supp at 1583-1584. The Court further stated that "Perhaps the most significant change... is the ICC Termination Act's express removal from the states of jurisdiction over wholly intrastate railroad tracks", and that "[w]ith the extension of exclusive federal jurisdiction over wholly intrastate tracks, one of the few railroad matters previously within the jurisdiction of the states, the ICC Termination Act evinces an intent by Congress to assume complete jurisdiction, to the exclusion of the states, over the regulation of railroad operations". *Id* at 1584. The Court also cited the ICCTA's new provision adding to the Board's exclusive jurisdiction "transportation between a place in a state and a place in the same state as part of the interstate rail network". *Id.*, citing Section 10501(b). Similarly, the Court in *BNSF v. Anderson*, stated that "Congress granted the newly established Surface Transportation Board jurisdiction

over railroad transportation in both interstate and intrastate commerce”. 959 F. Supp at 1294. Furthermore, in its own Order, *Ex Parte No. 388 State Intrastate Rail Rate Authority-Pub. L. No. 96-448* (1996)(1996 WL 148557), the Board noted that the ICCTA expanded the STB’s jurisdiction to “transportation between a place in a State and a place in the same State as part of the interstate rail network”, *citing* new Section 10501(b).

Thus, since the *State of Maine* decision was issued, there has been a dramatic change in the law. The Board now has jurisdiction over intrastate rail lines and intrastate rail operations on part of the interstate rail network. Accordingly, regardless of the original merit or lack of merit of the *State of Maine* line of cases, the rule in those cases is no longer tenable. That a carrier selling a line will continue to be responsible for freight transportation makes no difference to the Board’s jurisdiction; the sale of an intrastate line that will be used for interstate rail transportation is a matter within the exclusive jurisdiction of the Board. The idea that the Board has exclusive jurisdiction over a railroad’s decision to eliminate railroad agencies, build intermodal facilities and remove crossings, but not over the sale of a line that is part of the interstate rail network is obviously specious, yet that would be the result of perpetuation of the *State of Maine* rule. Additionally perpetuation of the *State of Maine* rule would mean that no entity would have jurisdiction over intrastate rail lines because State authority in that area was preempted by the ICCTA, and a decision to dismiss the notice of exemption would mean that the Board would not have jurisdiction. Such an outcome is contrary to the language, purpose and history of the Act. The Board should therefore reject the rule from *State of Maine* and specifically reject San Benito’s reliance on that rule here.

Since the Board plainly has jurisdiction over rail lines that are part of the interstate rail network and must approve or exempt an acquisition of such a line, and since San Benito’s sole

argument depends on the *State of Maine* rule which was erroneous from the start, and is plainly wrong since the enactment of the ICCTA, San Benito's motion is without merit and should be denied.

CONCLUSION

For all of the foregoing reasons, the motion of San Benito for dismissal of its notice of exemption should be denied.

Respectfully submitted,

/s/ 

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Dated: May 8, 2009

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served one copy of the foregoing Opposition to Motion to Dismiss Notice of Exemption by overnight delivery, to the offices of the following:

Kevin M. Sheys
Janie Sheng
K&L Gates LLP
1601 K Street, NW
Washington, DC 20006

Date: May 8, 2009

/s/ 
Richard S. Edelman

ATTACHMENT 1

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35225

**SAN BENITO RAILROAD LLC
--ACQUISITION EXEMPTION--
CERTAIN ASSETS OF UNION PACIFIC RAILROAD COMPANY**

DECLARATION OF LOUIS BELOW

I, LOUIS BELOW, declare under penalty of perjury pursuant to 28 U.S. C. §1746 that the following is true and correct and based upon personal knowledge:

1. I am the General Chairman of the Pacific Federation of the Brotherhood of Maintenance of Way Employees Division, International Brotherhood of Teamsters ("BMWED"). BMWED is the representative for collective bargaining under Section 1, Sixth, of the RLA, 45 U.S.C. § 151, Sixth, of employees of the Union Pacific Railroad Company ("UP") working in the class or craft of maintenance of way employee.

2. Among other things, UP maintenance of way employees represented by BMWED are responsible for constructing, maintaining, repairing, rehabilitating, upgrading, and renewing UP's track and right of way, as well as bridges, buildings, and other structures. BMWED and UP are parties to a collective bargaining agreement covering Maintenance of Way Employees employed by UP.

3. BMWED recently became aware of a planned transaction between San Benito Railroad LLC to acquire a rail line from UP in a transaction by which: 1) San Benito would purchase a UP line in the County of San Benito, California and would, through a third party, provide passenger rail service on that line; but 2) the line would still be part of the interstate rail system, and would still be used by UP for freight transport.

4. The line in question in San Benito County is a UP line that is covered by a BMWED - UP agreement applicable on a portion of the former Southern Pacific that is now part of UP ("BMWED-UP Agreement"). BMWED members are responsible for performance of inspection, maintenance and renewal of that line, and they do such work under the BMWED-UP Agreement.

5. The line to be conveyed currently serves two shippers: San Benito Foods and Tri Cal Chemicals. The line connects with the UP double track main line in Carnadero, California; the UP line then runs through Gilroy to San Francisco. At Gilroy one can connect to Cal Train, Cal Train runs to San Francisco. Cal Train services San Jose station which is also serviced by Amtrak. A passenger could take Cal Train to San Jose and then get on the Amtrak Coast Starlight trains that run between Seattle and Los Angeles.

6. It is BMWED's understanding that, as a result of the proposed sale, while UP will still handle freight traffic on the line, San Benito, as owner of the line, would ultimately be responsible for inspection, maintenance, and repair of the track, structures and right of way, work that is now performed by UP maintenance of way employees, generally 3-4 person section gangs. Additionally, UP maintenance of way forces have recently upgraded numerous grade crossings on the line in Hollister, California and there were plans for additional crossing upgrades. An effect of the proposed transaction would be that track, structures and right of way work that is currently UP's responsibility and is performed by UP maintenance of way employees would become the responsibility to San Benito.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

May 5, 2009


Louis Below

ATTACHMENT 2

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 35225

**SAN BENITO RAILROAD LLC
-ACQUISITION EXEMPTION-
CERTAIN ASSETS OF UNION PACIFIC RAILROAD COMPANY**

DECLARATION OF JOSEPH HARRY DOUCET, JR.

I, JOSEPH HARRY DOUCET, JR., declare under penalty of perjury pursuant to 28 U.S.C. §1746 that the following is true and correct and based upon personal knowledge:

1. I am the General Chairman of the Union Pacific General Committee of the Brotherhood of Railroad Signalmen ("BRS"). BRS is the representative for collective bargaining under Section 1, Sixth, of the RLA, 45 U.S.C. § 151, Sixth, of employees of the Union Pacific Railroad Company ("UP") working in the class or craft of signalman.

2. Among other things, UP Signalmen represented by BRS are responsible for constructing, inspecting, maintaining, and repairing UP's signal system, including crossings. BRS and UP are parties to a collective bargaining agreement covering signalmen employed by UP.

3. BRS recently became aware of a planned transaction between San Benito Railroad LLC to acquire a rail line from UP in a transaction by which: 1) San Benito would purchase a UP line in the County of San Benito, California and would, through a third party, provide passenger rail service on that line; but 2) the line would still be part of the interstate rail system, and would still be used by UP for freight transport.

4. The line in question in San Benito County is a UP line that is covered by a BRS-UP agreement applicable on a portion of the former Southern Pacific that is now part of UP ("BRS-

UP Agreement"). BRS members are responsible for performance of construction, inspection, maintenance and repair of the signal system for that line, and they do such work under the BRS-UP Agreement.

5. The line to be conveyed currently serves two shippers: San Benito Foods and Tri Cal Chemicals. The line connects with the UP double track main line in Camadero, California; the UP line then runs through Gilroy to San Francisco. At Gilroy one can connect to Cal Train, Cal Train runs to San Francisco. Cal Train services San Jose station which is also serviced by Amtrak. A passenger could take Cal Train to San Jose and then get on the Amtrak Coast Starlight trains that run between Seattle and Los Angeles.

6. It is BRS's understanding that, as a result of the proposed sale, while UP will still handle freight traffic on the line, San Benito, as owner of the line, would ultimately be responsible for construction, inspection, maintenance and repair of the signal system for that line that is now performed by UP signalmen, presently one or two maintainers. Additionally, UP signal forces are responsible for signal construction work on the line and for crossing improvements. An effect of the proposed transaction would be that construction, inspection, maintenance and repair of the signal system for that line that is currently UP's responsibility and is performed by UP signalmen would become the responsibility of San Benito.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

May 6, 2009


Joseph Harry Doucet, Jr.